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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. CR-F-02-5301 OWW
	)	
Plaintiff,	)	
	)	DEFENDANT DANIEL BOOBAR S
vs.	)	SENTENCING MEMORANDUM AND
	)	FORMAL OBJECTIONS
DANIEL BOOBAR,	)	
	)	DATED: May 1, 2006
Defendants.	)	TIME: 3:00 p.m.
_____	)	COURT: Honorable Oliver W. Wanger

Daniel Boobar, by and through his Attorney, Eric K. Fogderude submits the following as his objections to the Presentence Report.

Defendant Boobar submitted his informal objections to the U.S. Probation Office and U.S. Attorney's Office on March 30, 2006. On April 18, 2006, Defendant Boobar received the U.S. Probation Office response to his informal objections.

Defendant Boobar, incorporates by reference thereto, the entire court file in this case, including trial transcripts, motions, and pleadings, including, but not limited to Defendant Boobar's pending Motion To Dismiss or in the Alternative, Motion for a New Trial, as well as the presentence investigator reports

1 and any formal objections and/or sentencing memorandums and oral  
 2 arguments related to the sentencing of co-defendants Emmerson,  
 3 Harland and Hariaczyi.

#### 4 I. INTRODUCTION

5 The Federal Courts once again have been authorized to  
 6 exercise judicial powers by evaluating all statutory factors  
 7 relevant to sentencing; instead of being restricted to just those  
 8 factors the Sentencing commission deemed permissible. On January  
 9 12, 2005, the Supreme Court issued its two-part decision in United  
 10 States v. Booker, 125 S.Ct. 738 (2005), holding that Blakely v.  
 11 Washington, 124 5.Ct.2531 (2004) applies to the Federal Sentencing  
 12 Guidelines such that the Sixth Amendments right to jury trial is  
 13 violated by increasing a sentence above the maximum based on  
 14 judicial findings of fact, and ruling unconstitutional certain  
 15 provisions of the Guidelines that make it mandatory for Federal  
 16 Judges to follow the Guidelines. The majority decision held that  
 17 Guidelines violated the defendant s Sixth Amendment right to a  
 18 jury trial because they require judges to find facts that increase  
 19 a sentence beyond the sentence that could be imposed based solely  
 20 on the jury s verdict.

21 Under Booker the court held the mandatory *aspects* of the  
 22 Guidelines could be severed while preserving the overall statutory  
 23 scheme. The Breyer majority in Booker held that 18 U.S.C.  
 24 3553(b)(1) (stating courts shall impose a sentence.. within the  
 25 range , set by the guidelines.) and 18 U.S.C. 3742(e) were  
 26 incompatible with today s constitutional holding and thus must be  
 27 excised from the Guidelines. Booker, 2005 U.S. Lexis 628 at 28,  
 28

1 47. Thus, the Feeney Amendment, otherwise known as the Protect  
2 Act, mandating *de novo* review of downward departures, is no longer  
3 in effect. So modified, the Court continued, The Federal  
4 Sentencing Act...makes the guideline *effectively advisory*. It  
5 requires a sentencing court to consider the Guideline ranges (See,  
6 18 U.S.C. 3553(a)4 (Supp.2004), but it permits the court to tailor  
7 the sentence in light of other statutory concerns as well. (See,  
8 3553(a) (Supp.2004)) (emphasis added).

9 The exercise of judicial discretion is reviewed for  
10 reasonableness, including determination based on factors that  
11 were considered downward departures under the Guideline before  
12 Booker. Booker, 2005 U.S. Lexis 628 at 74-76.

13 It follows that, under Booker, courts must treat the  
14 Guidelines as just one of a number of sentencing factors. Thus,  
15 the court is no longer required to essentially disregard relevant  
16 circumstances that fall within the broad categories identified by  
17 18 U.S.C. section 3553(a) where they conflict with the previously  
18 mandatory Guidelines. 18 U.S.C. section 3553(a) states that  
19 sentencing courts shall consider apart from the Sentencing  
20 Guidelines, the following:

21 (1) the nature and circumstances of the offense and the  
22 history and character of the defendant;

23 (2) the need for the sentence to: (A) reflect the seriousness  
24 of the offense, to promote respect for the law, and to provide  
25 just punishment for the offense; (B) to afford adequate deterrence  
26 to criminal conduct; (C) to protect the public from further  
27 crimes of the defendant; and (D) to provide the defendant with  
28

1 needed educational or vocational training, medical care, or other  
 2 correctional treatment in the most effective manner;

3 (3) the kinds of sentences available;

4 (4) the need to avoid unwanted sentencing disparities among  
 5 defendants with similar records who have been found guilty of  
 6 similar conduct; and

7 (5) the need to provide restitution to any victims of the  
 8 offense. 18 U.S.C. 3553(a).

9 Moreover, 3553(a) directs the court to impose a sentence  
 10 sufficient, but not greater than necessary, to comply with the  
 11 purpose set forth in [3553(a)(2)]. Id.

## 12 **II. BURDEN OF PROOF**

13 Under the facts of the present case, where the consequences  
 14 are serious and the evidence dubious or contested at best, the  
 15 Court should use a reasonable doubt standard for fact-finding at  
 16 sentencing. Ninth Circuit law held before the decision in United  
 17 States v. Booker, 125 S.Ct. 738 (2005). that the government bears  
 18 the burden of proving guidelines enhancements (e.g., loss, drug  
 19 weight, role, etc.) by at least a clear preponderance of reliable  
 20 evidence. United States v. Mezas de Jesus, 217 F.3d 638, 642-43  
 21 (9<sup>th</sup> Cir. 2000); United States v. Montano, 250 F.3d 709, 713 (9<sup>th</sup>  
 22 Cir. 2001). The Sentencing Commission itself suggests that a bare  
 23 preponderance - greater weight of credible evidence - is good  
 24 enough. USSG § 6A1.3(a)(p.s.), commentary. As a policy  
 25 statement, this was the only advice for the courts, not a binding  
 26 rule. Now, after Booker, the Commission's policy statements are  
 27 only a factor for courts to consider. 18 U.S.C. § 3553(a)(5).  
 28

1 In this light, some courts have recently held that they will  
2 insist on a more stringent burden of proof, either beyond a  
3 reasonable doubt, or at the least, clear and convincing, even  
4 where the guideline are advisory. See United States v. Malouf,  
5 377 F.Supp.2d 315 (D.Mass. 2005); United States v. Munoz, 233 F.3d  
6 1117, 1126-27 (9<sup>th</sup> Cir.2000) (the pre-Booker case held that clear  
7 and convincing evidence is required for relevant conduct that  
8 results in an offense level increase of more than four levels);  
9 United States v. Kikumura, 918 F.2d 1084, 1098-1102 (3d Cir. 1990)  
10 (requiring at least clear and convincing evidence for upward  
11 departure of five or more levels, based on finding of intent to  
12 kill, utilizing a due process balancing test); Kikumura II, 947  
13 F.2d 72 (3d Cir.1991) (declining to address application of  
14 reasonable doubt standard because it was not raised on first  
15 appeal).

16 The Tenth Circuit has suggested that a district court may  
17 apply a burden of proof of beyond a reasonable doubt or, at least,  
18 a level of fact-skepticism beyond a mere preponderance. See  
19 United States v. Dazey, 403 F.3d 1147, 1178 (10<sup>th</sup> Cir. 2005);  
20 United States v. Pimental, 367 F.Supp.2d 143 (D.Mass.  
21 2005) (holding that Fifth Amendment requires application of the  
22 beyond a reasonable doubt standard to enhancements because each  
23 judicial finding of fact has quantifiable consequences on  
24 defendant s sentence); [accord] United States v. Coleman, 2005 WL  
25 1226622, 6-7 (S.D. Ohio 2005); United States v. Kelley, 355  
26 F.Supp.2d 1031 (D.Neb. 2005); United States v. Carvajal, 2005 WL  
27 476125 (S.D.N.Y. 2005); United States v. Gray, 362 F.Supp.2d 714  
28

(S.D.W.Va. 2005); United States v. Harper, 360 F.Supp.2d 833 (E.D. Tex. 2005).

Judge Bataillon, of the United States District Court for the District of Nebraska, last year issued a memorandum opinion analyzing the impact of the Apprendi/Booker line of cases on the question of the applicable burden of proof for findings that increase the defendant's sentence under the advisory guidelines. United States v. Huerta-Rodriguez, 355 F.Supp.2d 1019 (D.Neb.2005). The court held that to comply with due process, it would require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence. Because the line separating a sentencing enhancement fact from an element of the offense remains blurred after Booker, the court determined to err on the side of caution in protecting a criminal defendant's constitutional rights. The court wrote:

[T]he court will apply the same standard of proof to the factual showing that would be applied in reviewing the sufficiency of the evidence to support the finding, or in conducting harmless error review on appeal, e.g., whether a reasonable juror could have found the fact beyond a reasonable doubt. [Citations and footnote omitted.]

Whatever the constitutional limitations on the advisory sentencing scheme, the court finds that it can never be reasonable to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt.

See Huerta-Rodriguez, 355 F.Supp.2d at 20, citing Ring v. Arizona, 536 U.S. 584, 592-93 and n.1 (2000); Apprendi, 530 U.S. at 477; and Jones v. United States, 526 U.S. 227, 243 n. 6 (1999).

1 In a more recent decision, Judge Bataillon reiterated that the  
2 Fifth Amendment required the court to use a standard of proof of  
3 beyond a reasonable doubt. United States v. Okai, 2005 WL 2042301  
4 (D.Neb. 2005). The court noted that, while the remedial section  
5 of the Booker decision concluded that there was no Sixth Amendment  
6 violation if the guidelines were advisory, that decision did not  
7 resolve the question of whether an increased sentence nonetheless  
8 violated the Fifth Amendment. 2005 WL 2042301. The court  
9 reasoned that because a sentencing court's discretion remained  
10 limited after Booker, constitutional safeguards attach to a  
11 sentence at the point which the sentence exceeds the limits  
12 fixed by law. (quoting Apprendi v. New Jersey, 530 U.S.466, 566  
13 n. 9 (2000)). Those limits are established by the defendant's  
14 plea or the jury verdict.

15 On the basis of these precedents, there is a solid foundation  
16 for counsel to argue, in appropriate cases where the consequences  
17 are serious or the evidence dubious, for the use of a reasonable  
18 doubt standard for fact-finding at sentencing or, at least, a  
19 standard of clear and convincing evidence.

### 20 III. TRIAL AND POST TRIAL EVIDENCE SUMMARY

21 The government contended at trial that Mr. Boobar entered  
22 into a conspiracy with defendants Harland and Emmerson to sexually  
23 exploit children by producing and/or distributing child  
24 pornographic images via the internet.

25 Prior to the trial, both Emmerson and Harland became  
26 cooperating government witnesses, participating in numerous  
27 interviews with U.S. Customs and other government agents and both  
28

1 had negotiated favorable plea agreements with the government.

2 **A. HARLAND S TRIAL TESTIMONY AND GOVERNMENT EXHIBITS 16.1 - 16.23**

3 At trial, the government introduced a series of pornographic  
4 pictures taken by Harland of his daughter, which pictures were  
5 located on Emmerson s computer in a file designated for Harland.  
6 RT 1124-1126. There was no forensic evidence showing whether  
7 these photographs were ever transferred by Harland or Emmerson to  
8 Boobar s computer or that Boobar ever received these pictures.  
9 Boobar testified at trial he never received the photographs.

10 Harland testified at trial he took the photographs in series  
11 16.0-16.23 at the request of Mr. Boobar, RT 1370:21-25, 1371:1-3,  
12 that he did not place them on his website and that he sent them to  
13 Mr. Boobar and Emmerson, RT 1371-1376 and that Boobar knew about  
14 and requested these photographs be sent to him. RT 1371:16-18.

15 Harland testified that prior to trial he was interviewed four  
16 times by the government and/or its agents, RT 1404 and that during  
17 one of the interviews they showed him the series of photographs  
18 16.1-16.23 and told him they retrieved them from Emmerson s  
19 computer. Harland testified that he sent those photographs to  
20 Emmerson and Boobar. RT 1406-1409, 1410:20-22. He further  
21 testified that the only other person he sent them to was Paul  
22 Whitmore. RT 1422 17-21.

23 **B. HARLAND POST TRIAL DISCOVERY**

24 After the conclusion of the trial, the government was ordered  
25 to provide sentence related discovery. The government  
26 subsequently disclosed over 100 hundred of U.S. Customs reports, a  
27 CD disc, and a audio tape, which included Mr. Harland s taped  
28



1 confession following his arrest by the U.S. Customs, the F.B.I.,  
2 and it s multi-law enforcement agency task force. The contents of  
3 that discovery are the subject matter of a pending Motion to  
4 Dismiss and/or Motion For a New Trial.

5 Harland s trial testimony is in direct conflict with  
6 Harland s recently disclosed March 12,2002, interview in which he  
7 stated he only sent those photographs to two (2) people, Emmerson  
8 and Whitmore, that the idea for taking the photos was his idea,  
9 and that they were the only persons who knew about these photos.  
10 Transcript pp. 8-10, 14.

11 **HERBERT:** How old did you did you start taking pictures of your  
daughter?

12 **HARLAND:** I m really not one hundred percent certain, it was just a  
thing that seemed exciting at the time, I really don t know.

13 **HERBERT:** Was it somebody else s idea, you idea?

14 **HARLAND:** Well, I d taken, as you do take photographs of family and  
it just went I guess one stage too far. See Transcript p. 8

15 **HEBERT:** Just your daughter

**HARLAND:** Yes

16 **HEBERT:** Did you ever trade these pictures on the internet?

**HARLAND:** The ones of my daughter, yes

17 **HEBERT:** How about you and your daughter

**HARLAND:** Uh, I did

18 **HEBERT:** Okay, do you know who you sent those to?

**HARLAND:** Man out in California

19 **HEBERT:** Okay, do you know his name?

**HARLAND:** Uh, Lloyd

20 **HEBERT:** Lloyd, anybody else?

**HARLAND:** There was another man called Paul, and I don t know his  
21 other name, I m still trying to think of his screen name, I know I  
was introduced to him by Lloyd, he was a friend of his

22 **HEBERT:** A friend of Lloyd s

**HARLAND:** Yes

23 **HEBERT:** Do you know where Paul s at?

**HARLAND:** I think he s in California

24 **HEBERT:** Did Paul and Lloyd send you pictures?

**HARLAND:** Yes they did at one time

25 **HEBERT:** What kind of pictures did they send you

**HARLAND:** The same kind. See Transcript pp. 9-10.

26 **HEBERT:** Have you taken any other pictures other than the ones of  
27 your daughter that we were looking at tonight of anybody under the  
age of eighteen?  
28

1 HARLAND: No  
2 HEBERT: Without their clothes on?  
3 HARLAND: No  
4 HEBERT: Has anybody else taken any pictures of your daughter  
5 without her clothes on?  
6 HARLAND: No  
7 HEBERT: Did anybody know about these pictures you were taking?  
8 HARLAND: No  
9 HEBERT: Other than Paul and Lloyd?  
10 HARLAND: No  
11 HEBERT: Paul and Lloyd know  
12 HARLAND: That s correct  
13 HEBERT: You sent them both pictures?  
14 HARLAND: That s correct. See Transcript p. 14.

15 The pictures shown to Harland during the interview appear to  
16 be the same ones which were contained on a CD disc forwarded by  
17 Clovis Police Department to U.S. Customs in West Palm Beach  
18 Florida, March 11, 2002, and which disc was provided as  
19 discovery on November 2, 2005. That disc contains pictures  
20 introduced at trial as the government exhibit series 16. The  
21 investigation subsequently established that Paul was co-defendant  
22 Paul Whitmore and Lloyd was co-defendant Lloyd Emmerson.

23 The statement of Harland at the time of his arrest was  
24 exculpatory evidence and critical to the defense in that it  
25 corroborated Mr. Boobar s defense that he never requested,  
26 received, or had knowledge of the series 16 photographs and it  
27 also impeached the government s star witness at trial, Mr. Harland  
28 as to the above stated facts and his other testimony.

**C. EMMERSON S TRIAL TESTIMONY AND GOVERNMENT EXHIBITS 1.1-1.28**

23 At trial, the government contended that Emmerson had  
24 transmitted child pornographic images to Mr. Boobar via his  
25 computer, which images were received by Mr. Boobar via his  
26 computer.

27 The government relied on the testimony of Clovis Police  
28

1 Officer Cassida, who testified that it was his opinion that the  
2 photographs contained in government exhibit 1.1- 1.28 were  
3 transferred from Emmerson s computer to Boobar s computer via file  
4 transfer protocol.

5 The defense testimony of the defendant and computer forensic  
6 expert, Dr. C. Stephen Carr, was to the contrary.

7 Although Emmerson was a cooperating government witness, the  
8 government did not call him as a witness, so the defense did.  
9 Emmerson s testimony corroborated Mr. Boobar s, in that he stated  
10 he did not recall sending/placing series 1.1 - 1.28 in Boobar s  
11 file, which would have made them accessible by Boobar. He further  
12 testified that he was careful to only put photographs in Boobar s  
13 file that he knew Boobar wanted, which was clothed photos of girls  
14 and fictional stories.

15 The government then attempted to impeach Emmerson by asking  
16 if he drank alcohol in the past and whether he had a good  
17 recollection of what he did back then. See RT 1472-1486.

18 **D. EMMERSON POST TRIAL DISCOVERY**

19 After the conclusion of the trial, the government provided  
20 discovery which included U.S. Customs reports which describe a  
21 list provided by Emmerson in which he names those individuals who  
22 were involved with Emmerson in the production and/or distribution  
23 of child pornography, hereinafter, referred to as Emmerson List #  
24 1". A redacted copy of Emmerson List # 1" is attached as Exhibit  
25 A. The names have been redacted because the report may still  
26 represent a continuing law enforcement investigation. Daniel  
27 Boobar was not named on this list.

1 On March 8, 2006, the government produced as additional  
2 discovery, what purports to be the Emmerson List #2". A copy of  
3 Emmerson List #2 and accompanying transmission letter is attached  
4 hereto as Exhibit B. The defense contends, absent a denial by the  
5 government, that the Emmerson List # 2 was written by their  
6 cooperating witness, Mr. Emmerson and that this is the list  
7 referred to in the U.S. Customs report marked Exhibit A.

8 The recently discovered Emmerson list #1 describes in  
9 detail those persons who were involved in child porn activities  
10 with Emmerson over the internet. The list was provided to the  
11 government two (2) years prior to when Emmerson s testified at  
12 trial. The list provided their names and addresses and other  
13 indicia information, and confirmed that Mr. Emmerson will provide  
14 testimonial evidence against those individuals. Although there  
15 still remains confusion by the government whether the actual list  
16 has been located by the government, it s existence and contents  
17 are well described and documented in the recently disclosed U.S.  
18 Customs reports.

19 ...To this day, it is unclear whether Emmerson actually  
20 wrote out a list of names and addresses of suspects or whether,  
21 more than likely, he provided investigators with indicia of  
22 addresses and supplemented it with verbal statements. What is  
23 clear, and what the parties appear to agree on, is Emmerson did  
24 provide law enforcement with information about several suspects  
25 after he was arrested and in approximately March 2002. See  
26 Government s Opposition to Defendant s Motion to Dismiss at page  
27 23, lines 19-25.

1 What is also clear and what the parties appear to agree on is  
2 that Mr. Boobar was not named on either Emmerson List #1 or #2,  
3 but eleven others were named.

4 These lists were exculpatory in nature and consistent with  
5 Mr. Boobar's testimony and defense that he never produced,  
6 requested or received Govt. exhibits 1.1 - 1.28 or any other child  
7 pornographic pictures from Emmerson or Harland.

8 The lists were also relevant and material to rehabilitate the  
9 testimony of Emmerson after the government impeached him as having  
10 a bad memory, in that Emmerson had provided prior consistent  
11 statements to government agents virtually since his arrest two  
12 years earlier. The favorable statement also reflected the  
13 extensive reliance the government agents placed on his statement  
14 as to other suspects.

15 **E. SUMMARY OF CONTESTED AND UNCONTESTED FACTS**

16 The following sentencing related facts have been  
17 established at either the trial and/or in the post trial discovery  
18 or in both, as follows:

19 1. Mr. Boobar is not alleged to have conspired with any of  
20 the nineteen co-defendants, other than Emmerson and Harland.  
21 (Uncontested at trial) Whether Mr. Boobar criminally conspired  
22 with Emmerson and/or Harland was contested at trial.

23 2. No child pornographic images were found in Mr. Boobar's  
24 home, personal property or computer. (Uncontested at trial)

25 3. Mr. Boobar did not produce images of child pornography.  
26 (Uncontested at trial)

27 4. Mr. Boobar did not distribute child pornographic images  
28

1 via the internet to Emmerson, Harland, or anyone else.

2 (Uncontested at trial)

3 5. Mr. Boobar did distribute non-pornographic images on  
4 clothed children via the internet. (Uncontested at trial)

5 6. Mr. Boobar did distribute non-criminal fictional stories  
6 of sexual encounters between adults and children over the  
7 internet. (Uncontested at trial)

8 7. Mr. Boobar did engage in fantasy chats and role playing  
9 with Harland regarding the fictional stories via the internet.  
10 (Uncontested at trial)

11 8. Mr. Boobar never requested or received from Harland via  
12 the internet the pornographic pictures taken by Harland an  
13 introduced at trial as Government Series 16.1 - 16.23. (Contested  
14 at trial)

15 At trial, Harland testified he transmitted these images to  
16 Boobar. At trial Boobar denied receiving these images. The  
17 expert witnesses for the government and defense both testified  
18 that there was no forensic scientific evidence to support  
19 Harland s testimony. The post-conviction discovery of Harland s  
20 arrest-confession resulting from the U.S. Customs/FBI/multi-task  
21 force investigation now confirms that Harland did not send these  
22 images to Mr. Boobar and that Mr. Boobar did not know of these  
23 images. See Boobar s Motion to Dismiss at pages 12-  
24 13. See Exhibit C, i.e. West Palm Beach Sheriff s Office report  
25 at page 5 of 8. See Exhibit 10 of Boobar s Motion to Dismiss i.e.  
26 Transcript of Harland s confession on March 12, 2002.

27 9. Mr. Boobar never requested or received from Emmerson the  
28

1 child pornographic pictures introduced as Government Exhibits 1.1  
2 - 1.28. (Contested at trial)

3 At trial the government's witness, Clovis Police Officer  
4 Cassida testified that it was his opinion based upon an analysis  
5 of Emmerson's computer that these images had been transferred via  
6 the internet and received by Mr. Boobar.

7 The defense expert, Dr. C. Stephen Carr, testified to the  
8 contrary. Dr. Carr's qualifications include a Ph.D. in Electrical  
9 Engineering and Computer Sciences and being one of 20 researchers  
10 working on the ARPA Net, which was the foundation for the current  
11 Internet. A copy of Dr. Carr's curriculum vitae is attached hereto  
12 as Exhibit D. In addition, Mr. Boobar denied receipt of such  
13 images and Mr. Emmerson, a cooperating government witness,  
14 testified that he did not recall sending/placing such files in a  
15 sub-file for Boobar's access. Emmerson further testified that he  
16 recalled Boobar being interested in pictures of clothed girls and  
17 fictional stories, and these were the types of material that  
18 Emmerson placed in the Boobar accessible sub-file.

19 The post-conviction discovery has now produced two  
20 letters/lists prepared by Emmerson for the government shortly  
21 after Emmerson's arrest in which Emmerson lists those individuals  
22 he conspired with concerning child pornography. That list does  
23 not name Mr. Boobar or his screen name loltot .

#### 24 **F. CONCLUSION**

25 As to the above-stated sentence related facts which were  
26 contested at trial, i.e. Boobar's request for and/or receipt of  
27 Govt. Exhibits 1.1-1.28 and 16.1 - 16.23, the government has  
28

1 failed to meet its burden of proof under the beyond a reasonable  
2 doubt standard, or by a clear and convincing evidence standard.  
3 Therefore, these contested sentencing facts should not be  
4 considered for purposes of proving guideline enhancements.

5 **IV. SPECIFIC OBJECTION TO PRESENTENCE REPORT**

6 **A. The Offense Conduct, Paragraphs 12-17**

7 To the extent that the factual allegations contained in  
8 paragraphs 12-17 represent a summary of the allegations set forth  
9 in the superseding Indictment, no objections are made.

10 **B. Boobar s Specific Involvement, Paragraph 12-37**

11 1. Mr. Boobar moves the court to strike from the reports or  
12 in the alternative find that the government has failed to meet its  
13 burden of proof of any factual allegation that Mr. Boobar  
14 requested the production of and/or received child pornographic  
15 images from Emmerson and/or Harland. Mr. Boobar incorporates by  
16 reference, his summary of the trial and post-trial evidence  
17 related to these factual disputes, set forth in paragraph III  
18 hereinabove.

19 2. Mr. Boobar moves to strike as being factual incorrect,  
20 the last sentence of paragraph 37, which states that Emmerson  
21 testified at trial that he allowed Boobar to transfer his computer  
22 photographs of his daughter involved in sexually explicit  
23 behavior.

24 Mr. Emmerson s trial testimony was in fact to the contrary.  
25 See trial transcript at page 1472-1486.

26 **V. VICTIM IMPACT, PARAGRAPHS 38-39**

27 A. Mr. Boobar moves the court to strike the first sentence  
28



1 of paragraph 38 which states that there were 37 known children who  
2 were identified as victims of the overall conspiracy , on the  
3 grounds of lack of relevance and foundation.

4 The government did not contend nor was Mr. Boobar convicted  
5 of being involved in an overall conspiracy with the other  
6 nineteen co-defendants. The government s theory at trial was that  
7 Mr. Boobar was involved in a conspiracy with co-defendants  
8 Emmerson and Harland, which involved images of the four (4) minors  
9 depicted in the governments exhibit series 1.1-1.28 and 16.1-  
10 16.23.

11 As set forth hereinabove, Mr. Boobar disputes the governments  
12 theory.

13 B. Mr. Boobar moves the court to strike the last sentence of  
14 paragraph 39, concerning the opinion of an unidentified counselor  
15 as to when, if ever, Harland s daughter may manifest signs of  
16 abuse on the grounds that no discovery concerning this statement  
17 has been provided to the defense and on the grounds that it  
18 constitutes hearsay, speculation, and/or lacks sufficient  
19 foundation.

20 **VI. OBSTRUCTION OF JUSTICE, PARAGRAPHS 40-43, 53**

21 A. Paragraph 40 accurately sets forth that a two (2) level  
22 increase in the offense level under USSG 3C1.1 is only warranted  
23 if it is established that the defendant committed perjury during  
24 the trial and Paragraphs 41 and 42 accurately summarizes Mr.  
25 Boobar s testimony at trial.

26 B. Mr. Boobar objects to conclusion and/or inference stated  
27 in paragraph 43 that because the jury rendered a guilty verdict,  
28

1 Mr. Boobar must have committed perjury, and consequently a 2 level  
2 enhancement for obstruction of justice is warranted.

3 As set forth in Mr. Boobar's Motion For Dismissal and/or New  
4 Trial, the post jury trial discovery provided by the government  
5 corroborates Mr. Boobar's trial testimony that he did not ask for,  
6 receive or possess the child pornography photos from Harland or  
7 Emmerson and that he was not considered by Emmerson or Harland to  
8 be a conspirator of child pornography. Had this evidence been  
9 presented to the jury, Mr. Boobar contends their verdict would  
10 have been different.

11 An enhancement under USSG 3C1.1 applies only when there has  
12 been a denial of guilt by the defendant under oath that  
13 constitutes perjury. See USSG 3C1.1 commentary, Application Note  
14 2.

15 Application Note 2 further provides as follows:

16 In applying this provision in respect to alleged  
17 false testimony or statements by the defendant, the court  
18 should be cognizant that inaccurate testimony or statements  
19 sometimes may result from confusion, mistake, or faulty  
20 memory and, thus not all inaccurate testimony or statements  
21 necessarily reflect a willful attempt to obstruct justice.

22 For the above stated reasons the obstruction of justice  
23 enhancement does not apply.

24 **VII. GUIDELINE MANUEL USED, PARAGRAPH 46**

25 \_\_\_\_\_The presentence report recommends that the 2003 edition of the  
26 Guidelines Manuel be used.

27 The indictment alleges that between December 12, 1999 and  
28 January 26, 2002, that Defendant Boobar and other defendants  
conspired as charged. See Presentence Investigation Report  
paragraph 12.

1 As set forth hereinabove, Defendant Boobar is requesting that  
2 all evidence and testimony related to whether Defendant Boobar  
3 received the images from Emmerson and Harland identified as  
4 governments trial exhibit series 1.1 - 1.28 and 16.1-16.23,  
5 respectively, not be considered for any sentencing purpose.

6 In the event the Court does grant Defendant Boobar s request,  
7 the only remaining sentencing facts relate to the 1999 chat logs  
8 and therefore the 1999 edition of the Guidelines Manuel should be  
9 used.

10 **VIII. SPECIFIC OFFENSE CHARACTERISTICS, PARAGRAPH 48**

11 Mr. Boobar incorporates by reference his arguments set forth  
12 in paragraph VI.

13 Because of the evidence was contested as to whether or not  
14 Mr. Boobar received the images of Emmerson s and Harland s  
15 daughters and because no evidence was introduced as to the age of  
16 the red-headed girl , it is impossible to determine from the  
17 jury s verdict, whether the jury found beyond a reasonable doubt  
18 that any child under the age of 12 was a victim for which Mr.  
19 Boobar should be held accountable.

20 Therefore, the four (4) level increase should not be applied.

21 **IX. ADJUSTMENT FOR ROLE IN THE OFFENSE, PARAGRAPH 51**

22 Pursuant to USSG 3B1.2, if the defendant was a minimal  
23 participant in any criminal activity, the offense level should be  
24 decreased by 4 levels, and if the defendant was a minor  
25 participant to the offense level should be reduced by 2 levels.  
26 In cases falling between, a decrease of 3 levels is appropriate.

27 Application Note 4, provides that a minimal role in concerted  
28

1 activity is intended to cover defendants who are plainly among the  
2 least culpable of those involved in the conduct of a group.

3 Mr. Boobar s limited involvement with Emmerson and Harland  
4 pales in comparison to Emmerson and Harland s involvement in the  
5 general and as to all other co-defendants charged in the  
6 Indictment.

7 Emmerson and Harland were sexual abusers of their own  
8 children and they produced and distributed child pornography,  
9 including images of their own children to as many as 20 defendants  
10 charged in the instant indictment and others unnamed co-  
11 conspirators. Both possessed computer and/or CD files which  
12 depicted hundreds of thousands of images of child pornography.

13 Mr. Boobar did not sexually abuse children, he did not  
14 produce, distribute or possess images of child pornography, and he  
15 was only involved with two of the co-defendants, i.e. Harland and  
16 Emmerson. In addition, both Harland and Emmerson acknowledged  
17 that Mr. Boobar s conduct primarily focused upon the sharing of  
18 clothed and legal pictures of girls, the sharing of fictional  
19 stories and occasionally engaging in fantasy chats. See  
20 presentence report paragraphs 25, 26 and 34.

21 Mr. Boobar requests that the Court take judicial notice of  
22 the presentence investigative reports of co-defendants Hariaczyi,  
23 Harland and Emmerson concerning the nature and extent of their  
24 criminal conduct, as well as all other co-defendants charged in  
25 this indictment.

26 Mr. Boobar requests that a copy of co-defendants Hariaczyi.  
27 Harland and Emmerson presentence investigation reports also be  
28

1 attached as defense exhibits, for purposes of Mr. Boobar's  
2 sentencing hearing.

3 For the above stated reasons, Mr. Boobar is entitled to a 4  
4 level reduction under the guidelines for his minimal participation  
5 in the criminal conspiracy alleged in the indictment.

6 **X. MULTIPLE COUNT ADJUSTMENT, PARAGRAPHS 55-60**

7 Mr. Boobar incorporates his arguments set forth in paragraphs  
8 III and V.

9 The jury was not asked to decide the number of victims, if  
10 any, and it can not be determined from the verdict rendered  
11 whether the jury determined beyond a reasonable doubt whether  
12 there were one or more victims.

13 For the above stated reasons, a multiple count increase  
14 should not be applied.

15 **XI. ACCEPTANCE OF RESPONSIBILITY, PARAGRAPH 63**

16 Mr. Boobar as repeatedly expressed remorse and regret for the  
17 conduct he engaged in which resulted in his conviction. His  
18 statement is confirmed in paragraph 44 of the probation report and  
19 in his letter submitted to the court. During the trial, Mr.  
20 Boobar testified truthfully, acknowledging his communications with  
21 Emmerson and Harland, including the communication of fictional  
22 accounts of incestuous sexual encounters between adult males and  
23 underage females, and the engaging in fantasy chat and role  
24 playing sessions and the exchanging of images of underage  
25 children, such as alleged in overt act 2M of the Indictment.

26 Mr. Boobar also expressed remorse for his conduct when he  
27 testified at trial.  
28

1 The fact that Boobar testified at trial does not preclude him  
2 from receiving a 2 level reduction for acceptance of  
3 responsibility. Where a defendant goes to trial to make a  
4 challenge to the applicability of a statute to his conduct, he may  
5 still receive the 2 level adjustment (See USSG 3 Elolir  
6 Commentary, Application Note 2).

7 Mr. Boobar s defense was that although he engaged in fantasy  
8 fictional chats of a sexual nature concerning children, and  
9 distributed provocative pictures of clothed children, and  
10 distributed fictional stories of minors being sexually exploited,  
11 the chats, pictures and stories he shared represented  
12 constitutional protected speech. Numerous examples of these  
13 materials were moved into evidence as Defense Exhibits. The  
14 jury was then asked to determine whether Mr. Boobar s conduct  
15 violated the statute.

16 For the above stated reasons, Mr. Boobar is entitled to a 2  
17 level reduction under the guidelines for his acceptance of  
18 responsibility.

19 **XII. OFFENSE LEVEL AND GUIDELINE RANGE, PARAGRAPHS 64 AND 91**

20 For the reasons set forth hereinabove, the offense level  
21 should be the base offense level 27. The U.S.S.G. sentencing  
22 range for a criminal history level 1 and offense level of 27 is  
23 70-87 months.

24 The recommendation set forth in the presentence report on  
25 page 20 is for a sentence in the middle of the guideline range,  
26 which would be 78-79 months.

27 For the reasons set forth hereinabove under departures, a  
28

1 sentence at the bottom of the guideline is appropriate, and would  
2 result in a sentence of 78 months.

3 **XIII. DOWNWARD DEPARTURES 18 USC 3553(a), PARAGRAPH 95**

4 A. Mr. Boobar is entitled to a downward departure pursuant  
5 to USSG 3B 1.2 (a) in that the co-defendants role , the offense as  
6 set forth hereinabove in paragraph VIII, was that a minimal  
7 participant.

8 Chapter 1, Pt. A(4)(b) of the United States Sentencing  
9 Guidelines describes the concept of a heartland in the  
10 introduction. The United States Sentencing Commission intends the  
11 sentencing courts to treat each guideline as carving out a  
12 heartland , a set of typical cases embodying the conduct that  
13 each guideline describes. When a court finds an atypical case,  
14 one to which a particular guideline linguistically applies, but  
15 where conduct significantly differs from the norm, the court may  
16 consider whether a departure is warranted.

17 In United States v. Stevens, 197F.3d 1263 (9<sup>th</sup> Cir. 1999), the  
18 court held that the District Court must base its determination on  
19 the nature of the defendant's conduct in comparison with the  
20 conduct of the other offenders of the same statute, and that the  
21 heartland to be determined is the heartland of the offense of  
22 possession child pornography. Id. At 1268-1269.

23 In United States v. Parrish, 308 F.3d 1025, 1030 (9<sup>th</sup> Cir.  
24 2002), Parrish's conduct was compared with the conduct of a  
25 typical offender under this statute. The defendant's expert  
26 witness and the court concluded that Parrish's conduct was  
27 significantly less serious than that of offenders in other cases  
28

1 involving possession of child pornography. Parrish s activity was  
2 pretty minor compared to the content of images possessed by  
3 other offenders. His conduct was on the minimal end of the  
4 scale, when compared to the conduct of a typical child pornography  
5 offender.

6 The evidence in this case is quite clear that Mr. Boobar s  
7 conduct as compared to the other offenders is significantly less  
8 serious. His conduct is on the minimal end of the scale when  
9 compared to the conduct of a typical child pornography offender.

10 B. Mr. Boobar Should receive a downward departure to avoid  
11 unwanted sentencing disparities. 18 USC section 3553(a) states  
12 that the sentencing courts shall consider apart from the  
13 Sentencing Guidelines, the following:...

14 (4) the need to avoid unwanted sentencing disparities  
15 among defendants with similar records who have been  
found guilty of similar conduct.....

16 Co-defendant Trent Hariaczyi, was charged in the Superseding  
17 Indictment, along with Mr. Boobar, and others, with conspiracy to  
18 sexually exploit minors. See presentence report page 1b and  
19 superceding indictment.

20 On November 21, 2005, he was allowed to plead to a lesser  
21 offense of possession of visual depictions of sexual exploitation  
22 of a minor under 18 USC 2252(a)(4).

23 On March 7, 2006, Mr. Hariaczyi was sentenced to 21 months in  
24 prison. See Judgment filed March 8, 2006, Clerk s document 491.

25 A review of the governments sentencing memorandum of  
26 Hariaczyi s sentencing filed March 3, 2006, shows that his  
27 participation in the conspiracy was substantially greater and more  
28



1 involved than Mr. Boobars. See Clerk's document 486.

2 Attachment 1 to the government's sentencing brief, was a  
3 declaration of the government's chief investigating officer, Mike  
4 Cassida. That declaration set forth the following facts  
5 concerning Mr. Hariaczyi's relevant conduct in the Conspiracy  
6 charged in the Superceding Indictment and Hamlet investigation. A  
7 copy of that declaration is attached hereto as Exhibit E.

8 Mr. Hariaczyi talked about hiring an age 11-12 year old model  
9 for the purpose of taking her picture, including pictures without  
10 panties, Exhibit E at page 3; the encryption of pornographic CDs  
11 and the daily exchange of files between co-defendant Bowcut and  
12 Harland, Exhibit at page 4 & 5; Hariaczyi's receipt of one CD  
13 which contained almost 700 MB of child pornography pictures and  
14 videos, Exhibit E at page 5:10-14; Hariaczyi's receipt of images  
15 of Bowcut's minor daughter, Exhibit E at page 5:15-24; Hariaczyi's  
16 request of special pornographic pictures of Amanda, who was the  
17 daughter of co-conspirator John Zill, Exhibit E at page 6:20-27.  
18 Mr. Cassida confirms that Mr. Hariaczyi was a minor participant in  
19 this conspiracy. Exhibit E at page 7:8-9.

20 Mr. Boobars' involvement in the conspiracy is even less than  
21 that of Mr. Hariaczyi. The government contended Boobar received  
22 approximately 50 pornographic images from co-defendant Emerson  
23 and Harland, whereas Hariaczyi received 700 MB of child  
24 pornographic images and videos from co-defendant Zill and  
25 Bowcut. Boobar did not produce or send child pornography, but  
26 Hariaczyi did. Boobar voluntarily withdrew from the conspiracy  
27 and Hariaczyi did not. In order to avoid sentencing disparities  
28

1 among defendants with similar records for similar conduct, the  
2 court should depart and sentence Mr. Boobar to 23 months or the  
3 lowest level allowed by law.

4 The government confirms in its opposition brief to  
5 defendant s motion to dismiss, that Hariaczyi was one of eleven  
6 suspects identified as being a producer of images of child  
7 exploitation and a member of the conspiracy charged, but the  
8 government opted to allow Hariaczyi to plead to a different charge  
9 thereby resulting in his 23 month sentence. See Government s  
10 Opposition to Defendant s Motion to Dismiss at page 25, lines 6-13  
11 and footnote 3. The government is charged with promoting equal  
12 justice for all, including those it prosecutes for criminal  
13 conduct. As such, the government should allow Mr. Boobar, whose  
14 conduct was less egregious than Mr. Hariaczyi s, to plead to the  
15 same charge and receive a comparable sentence.

16 If the government makes such an offer, Mr. Boobar will accept  
17 the offer and withdraw his pending motion.

18 C. Mr. Boobar should receive a downward departure due  
19 to his unusual susceptibility to abuse while in prison.

20 During the trial, the Court had the opportunity to observe  
21 Mr. Boobar s appearance, demeanor and stature.

22 As noted in the presentence report, Mr. Boobar is a 39 year  
23 old male who has no prior juvenile or adult convictions. Prior to  
24 his remand into custody at the Fresno County Jail following his  
25 conviction, he had never before seen the inside of a jail or  
26 prison cell. For all practical purposes he is unsophisticated or  
27 naive as to rigors of prison confinement. Consequently, Mr. Boobar  
28

1 has an unusually high risk for being physically abused within the  
2 prison system. He is quite a gentle, appealing, thin, frail,  
3 young man of fair complexion with an esthetic and sensitive look  
4 about him. His personality is spiritual, non-aggressive, and non-  
5 assertive.

6 Pursuant to U.S.S.G. § 5H1.3, 5H1.4, the factors of physical,  
7 mental, and emotional condition are not ordinarily relevant in  
8 determining whether a sentence should be outside the guidelines.  
9 However, in U.S. v. Lara, the district court did not abuse its  
10 discretion in downwardly departing from the Guidelines range  
11 pursuant to § 3553(b). 905 F.2d 599, 606 (2d Cir. 1990)  
12 (superseded by statute as stated in Koon v. U.S., 518 U.S. 81  
13 (1996)). In finding that the defendant was particularly vulnerable  
14 to victimization, the court considered the defendant's fragility,  
15 sexual orientation and immature appearance. Moreover, the court  
16 granted the departure for the defendant's extreme vulnerability in  
17 light of the added burdens of incarceration that the defendant  
18 faced compared to those not standing in the defendant's shoes.Id.  
19 at 604. The court further stated that [e]xtreme vulnerability of  
20 criminal defendants is a factor that was not adequately considered  
21 by the Commission and a proper ground for departure under §§ 3553  
22 (b). Id. at 606.

23 Due to Mr. Boobar's youthful appearance, naivety, and passive  
24 demeanor, he is extraordinarily susceptible and vulnerable to  
25 victimization in the prison environment. Moreover, Mr. Boobar's  
26 complete lack of any prior incarceration or criminal history  
27 exposes him as a target for abuse by other inmates. Thus, because  
28

1 Mr. Boobar will be subject to victimization, which is an  
2 additional burden of incarceration that he faces compared to other  
3 defendant s not standing in his shoes, the Defense respectfully  
4 urges this Court to depart accordingly.

5 In a very similar situation, the Defendant in United States  
6 v. Parrish, 308 F.3d 1025, 1031, (attached as Exhibit C) was found  
7 susceptible to abuse in prison because of a combination of  
8 factors which included: his stature, his demeanor, his naivetè,  
9 [and] the nature of the offense.

10 The exact situation applies in this instance in that Daniel  
11 Boobar is a gentle, appealing, thin, frail young man of fair  
12 complexion with an esthetic and sensitive look about him.  
13 His personality is spiritual non-aggressive, and non-assertive.

14 Based upon Mr. Boobar s characteristics, it is abundantly  
15 clear that he is highly susceptible to abuse in prison and should  
16 be given a downward departure to avoid prison confinement to the  
17 maximum extent allowed by law.

18 D. Mr. Boobar should receive a downward departure because  
19 his participation in the instant case constituted aberrant  
20 behavior. 18 USC section 3553(a) states that sentencing courts  
21 shall consider apart from the Sentencing Guidelines, the  
22 following: (1) the nature and circumstances of the offense and the  
23 history and character of the defendant.

24 Mr. Boobar s participation in the instant offense, although  
25 minimal, departed substantially from his normal behavior.  
26 U.S.S.G. § 5K2.20 states, in part, that the Court may depart  
27 downward under this policy statement only if the defendant  
28

1 committed a single criminal occurrence or single criminal  
2 transaction without significant planning. In U.S. v. Fairless,  
3 the defendant received a downward departure from 30-60 months for  
4 a bank robbery charge in part because his actions constituted  
5 aberrant behavior. 975 F.2d 664 (9<sup>th</sup> Cir. 1992). In U.S. v.  
6 Vieke, defendant was granted a four level downward departure to  
7 probation in a credit card fraud case where the crime was totally  
8 out of suit with the rest of her life and the behaviors[,] even  
9 though the fraud went on for years. 348 F.3d 811 (9<sup>th</sup> Cir. 2003).

10 To qualify for departure according to aberrant behavior, a  
11 defendant's conduct must represent a marked deviation from an  
12 otherwise law-abiding life and is unavailable if the (1) offense  
13 involved serious bodily injury or death; (2) use or discharge of a  
14 firearm; (3) a serious drug-trafficking crime; or (4) the  
15 defendant has more than one criminal history point. Mr. Boobar's  
16 involvement in the present offense appears  
17 to be an act of aberrant behavior as described under U.S.S.G. §  
18 5K2.20.

19 As documented in the reports, is 39 year old who is the  
20 product of a family described as being close and supportive. His  
21 parents have been married 45 years, Mr. Boobar and his wife,  
22 Christina have been married for 13 years and they have maintained  
23 a good and strong marriage. The Boobar's have two children ages  
24 eight and five, who dearly miss their father. Mr. Boobar earned  
25 a bachelor's degree in business administration and economics and a  
26 masters degree in business administration. He and his wife both  
27 maintained business careers and he had no prior criminal history.  
28

1 Mr. Boobar was arrested on the present charge on November 1,  
2 2002, and was released on December 4, 2002, on stringent  
3 conditions which required his living with his parents, but  
4 allowing supervised visits with his children.

5 On March 31, 2003, because of what is described in the  
6 presentence report at paragraph 9 as extremely compliant behavior  
7 with the strict orders of his release , he was allowed to return  
8 to his family in Houston.

9 The report also described in paragraph 10 that during the  
10 ensuing 14 months, the defendant was described as a compliant and  
11 model defendant . Mr. Boobar was remanded to custody on May 6,  
12 2004, following being found guilty.

13 Mr. Boobar meets all the criteria for departure in accordance  
14 with his aberrant behavior. He played a minor, peripheral role in  
15 the present offense, which greatly deviated from his normal course  
16 of conduct.

17 Mr. Boobar asserts that the instant offense greatly deviates  
18 from his usual conduct, as exemplified by his commendable work  
19 ethic, mitigating role in the present offense, acknowledgment of  
20 remorse and lack of an exceptional criminal history. Thus, the  
21 defense respectfully requests that this Court consider that Mr.  
22 Boobar s involvement in the present offense constituted aberrant  
23 behavior in fashioning his sentence.

24 E. Mr. Boobar s Young Age, Employment History and Current  
25 Stable Employment Justifies Further Downward Departure.

26 Mr. Boobar has maintained stable and gainful employment  
27 throughout his adult life. See U.S. v. Bigcrow, 898 F.2d 1326,  
28

1 1331 (8<sup>th</sup> Cir. 1990) (excellent employment record); United States  
 2 v. Shoupe, 988 F.2d 440 (3d Cir. 1992) (age and immaturity  
 3 considered in whether criminal history overstates propensity);  
 4 U.S. v. Jones, 158 F.3d 492 (10<sup>th</sup> Cir. 1998) (where defendants pled  
 5 guilty to possession of a firearm by a prohibited person, the  
 6 district court did not abuse its discretion in departing downward  
 7 by three levels where, as one of the eleven factors, it considered  
 8 the defendant s long impressive work history...where jobs are  
 9 scarce. ); U.S. v. Alba, 933 F.2d 1117 (2d Cir. 1991)  
 10 (longstanding employment at two jobs); U.S. v. Jogmohan, 909 F.2d  
 11 61 (2d Cir. 1990) (exceptional employment history and nature of  
 12 the crime.)

13 Although age is not ordinarily relevant in determining a  
 14 defendant s sentence, pursuant to U.S.S.G. § 5H1.1, age may be  
 15 considered in unusual cases in combination with other factors.  
 16 See U.S. v. Hildebrand, 152 F.3d 756 (8<sup>th</sup> Cir. 1998).

17 In United States v. Higgins, the court stated that a  
 18 defendant s young age and stable employment will justify a  
 19 downward departure if extraordinary. 967 F.2d 841 (3d Cir. 1992).

20 At the time of his initial involvement in this case, Mr.  
 21 Boobar was in his early 30's and had extraordinary work ethic and  
 22 work history dating back to his graduation from high school. Mr.  
 23 Boobar has always approached his employment pursuits maturely and  
 24 responsibly. As noted in the presentence report in paragraphs 80-  
 25 86, since 1992 Mr. Boobar has owned and operated a shopping cart  
 26 business which had two employees and in 1998 he owned and operated  
 27 a second business where he sold palm pilots and trained palm pilot  
 28

1 users. From 1989 until 1994, the defendant was employed by the  
 2 Ramada Plaza Hotel where he worked as a bar manager and food and  
 3 beverage director before forming his own business.

4 Mr. Boobar is an independent and self-sufficient business  
 5 man. He has maintained gainful and steady employment throughout  
 6 his adult life. In the present case, predicated upon his relative  
 7 young age, ambition, exceptional commitment to his employment, and  
 8 lack of entanglement with the criminal justice system, these  
 9 factors collectively justify further downward departure.

10 F. Totality of Circumstances Warrants a Downward Departure.

11 The Ninth Circuit has long held that a combination of  
 12 factors can together constitute a mitigating circumstance  
 13 justifying departure. See United States v. Cook, 938 F.2d 149 (9<sup>th</sup>  
 14 Cir. 1991). In Cook, the Court explained that [t]here was no  
 15 reason to be so literal minded as to hold that a combination of  
 16 factors cannot together constitute a mitigating circumstance.  
 17 Id. at 153; see also U.S.S.G. § 5K2.0, Grounds for Departure  
 18 (acknowledging circumstances that warrant departure may not be  
 19 listed in Guideline). The above factors, when viewed in the  
 20 aggregate, support a downward departure of Mr. Boobar's sentence.  
 21 Mr. Boobar therefore respectfully requests that this Court  
 22 consider the above factors in their totality as well as  
 23 individually when determining departure.

24 One district court has observed that the statutory mandate to  
 25 consider the kinds of sentences available under 18 U.S.C. § 3553  
 26 (a) (3) is rarely mentioned in the sentencing courts. United  
 27 States v. Guirio, 887 F.Supp. 66, 68 (E.D.N.Y. 1995). While the  
 28



1 choices are many in theory, they may be fewer in practice. Id.  
2 (internal citations omitted). The Guidelines do not displace the  
3 traditional role of the district court in bringing compassion and  
4 common sense to the sentencing process. ... In areas where the  
5 Sentencing Commission has not spoken... district courts should not  
6 hesitate to use their discretion in devising sentences that  
7 provide individualized justice. United States v. Williams, 65  
8 F.3d 301, 309-310 (2<sup>nd</sup> Cir. 1995).

9 Mr. Boobar respectfully urges this Court to exercise its  
10 discretion and grant the requested departure based upon the  
11 compelling combination of circumstances that his case presents.  
12 Courts are authorized to depart downward when the combination of  
13 factors indicate departure is appropriate. 938 F.2d 149 (9<sup>th</sup> Cir.  
14 1991).

15 The defense requests a downward departure on behalf of Mr.  
16 Boobar to allow for a sentence no greater than that received by  
17 co-defendant Hariaczyi or as low as permitted by law.

#### 18 **XIV. JUSTIFICATION, PARAGRAPH 99**

19 The presentence investigation report recommends that as a  
20 condition of supervised release that Mr. Boobar register as a sex  
21 offender and that he be prohibited from having contact with  
22 children under age 18.

23 Mr. Boobar objects to the restriction prohibiting contact  
24 with his own children as it is more restrictive than the  
25 conditions of his pre-trial release. Mr. Boobar was allowed to  
26 reside with his wife and two minor children from March 2003 until  
27 May 2004, during which time he was described as extremely  
28

1 compliant and a model defendant. The allegation against Mr.  
2 Boobar was not that he molested any children or created any child  
3 pornography, but rather he received such images from others.

4 Mr. Boobar requests the same conditions carry over to  
5 supervised release, i.e. supervised contact with his own children.

6 Mr. Boobar objects to the mandatory requirement that he  
7 register as a sex offender. The statute of conviction does not  
8 require registration and it is uncertain where Mr. Boobar will  
9 reside when released. Mr. Boobar requests that he be ordered to  
10 obey all laws. In the event he resides in a state which requires  
11 registration for this conviction, he of course would be required  
12 to comply with that law.

13 Similar requests were raised on behalf of Mr. Hariaczyi at  
14 his sentencing, and granted by the Court. See Hariaczyi s  
15 Judgment In A Criminal Case at document 491, pages 4 and 5.

16 **CONCLUSION**

17 Congress basic statutory goal of diminishing sentencing  
18 disparity depends for its success upon judicial efforts to  
19 determine, and to base punishment upon, the real conduct  
20 underlying the crime of conviction. See U.S. v. Booker, supra.

21 For all of the reasons set forth, Mr. Boobar respectfully  
22 requests that he be sentenced to a term no greater than the  
23 sentence received by Mr. Hariaczyi and/or the minimum sentence  
24 allowed by law.

25  
26 DATED: April 18, 2006

Respectfully submitted,  
FLETCHER & FOGDERUDE, INC.

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/s/ Eric K. Fogderude  
Eric K. Fogderude, Attorney for  
Defendant, DANIEL BOOBAR